

FILED BY CLERK

MAY 13 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0233
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
HANSEL DIAZ,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20061608

Honorable Deborah Bernini, Judge

AFFIRMED

Law Office of Eric A. Larsen
By Eric A. Larsen

Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 After a three-day trial, a twelve-person jury found appellant Hansel Diaz guilty of armed robbery, aggravated robbery, aggravated assault, third-degree burglary, and theft of a means of transportation, all committed on April 24, 2006. It also found the first three charges to be dangerous-nature offenses involving the use or threatening exhibition of a handgun. In July 2009, the trial court sentenced Diaz to concurrent,

mitigated terms of imprisonment, the longest of which was an enhanced, seven-year term for armed robbery. This appeal followed.

¶2 Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asking us to search the record for fundamental error. In compliance with *Clark*, counsel has provided “a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record.” 196 Ariz. 530, ¶ 32, 2 P.3d at 97. Diaz has not filed a supplemental brief.

¶3 Viewed in the light most favorable to upholding the convictions, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence established that Diaz had accompanied his cousin, Carlos Gastelum, and a female codefendant, Dora Ortiz, to the home of the victim, A., who had advertised a Cadillac Escalade for sale. While Dora remained at the home with A.’s girlfriend, Gastelum took the Escalade for a test drive, accompanied by Diaz and A. Gastelum drove, A. sat in the front passenger seat, and Diaz sat in the backseat.

¶4 When A. told Gastelum they had driven far enough and it was time to turn back, Gastelum stopped the Escalade, Diaz put a gun to the back of A.’s head, and Diaz and Gastelum ordered A. to give them his wallet and telephone and get out of the vehicle. A. complied, and Gastelum and Diaz drove away in the Escalade. Within hours, police officers located Diaz and Gastelum in the Escalade and arrested them.

¶5 In addition to considerable other evidence against Diaz, he testified in his own defense at trial and admitted his role in committing the charged offenses, acting either as a principal or an accomplice. His defense was that he had not planned on committing any crime that night, had no prior knowledge of Gastelum’s intentions, and

merely had followed his cousin's directions because he was afraid of what Gastelum would do if he did not.

¶6 Counsel suggests as a possibly arguable issue that the trial court's instructions to the jury on duress and necessity did not include "a clear statement of what constitutes the reasonable person standard" and therefore could have misled the jurors as to the applicable standard. Counsel ultimately concedes, however—and we agree—that the instructions did not misstate the law and, "as a whole[,] adequately reflected [it]." We find no fundamental error in the instructions given on necessity and duress.¹

¶7 Substantial evidence supported the elements essential to Diaz's convictions, and his mitigated sentences were within the statutory range authorized for those offenses in April 2006. We have examined the entire record pursuant to *Anders* and have found no reversible error and no arguable issue warranting further appellate review. *See Anders*, 386 U.S. at 744. Diaz's convictions and sentences are therefore affirmed.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge

¹Because Diaz did not object to the instructions below, he waived his right to appellate relief for all but fundamental, prejudicial error. *See State v. Martinez*, 210 Ariz. 578, n.2, 115 P.3d 618, 620 n.2 (2005); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). *See also* Ariz. R. Crim. P. 21.3(c) (party may not "assign as error on appeal the court's giving or failing to give any instruction or portion thereof" unless party made specific, timely objection below, stating grounds).